No. 94-1721

Supreme Court, U.S.
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In The

Supreme Court Of The United States

OCTOBER TERM, 1994

TOWN OF SMITHTOWN and JAMES DOWLING,

Petitioners,

-against-

ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In this brief we reply only to certain of the most egregious defects in respondents' arguments in opposition to our petition for certiorari. As to most of what respondents argue in their Brief in Opposition we believe that such arguments were sufficiently anticipated and answered in our petition.

ARGUMENT

1. RESPONDENTS' FAILURE TO ESTABLISH THAT THEY WERE DEPRIVED OF A FUNDAMENTAL RIGHT.

Respondents' apparently believe it is sufficient in order to establish that they were deprived of a substantive due process protected property interest for them to argue as if they were all owners of the land owned by Mr. Walz and to treat the street opening permit which was sought by the Water Authority as if it were the equivalent of a building permit or other certificate directly affecting a landowner's right to use its land. Compare RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir.) (building permit), cert. denied, 493 U.S. 893 (1989), cited and relied upon at page 6 of respondents' brief.

In this regard, they ignore that in fact only Mr. Walz is claimed to have any ownership interest in this property. Equally significant, they ignore that this

permit did not directly affect how this property could be lawfully used. It pertained, in terms, only to whether the Authority could open up the Town-owned street.

Also, respondents ignore that in RRI Realty the court of appeals had held that the landowner-plaintiff in that case did not have a Fourteenth Amendment protected "property interest" in the permit there sought. See 870 F.2d at 912. It did not sufficiently demonstrate its "entitlement" to the permit sought. Id., at 918-20.

Beyond that, and far more important, respondents' argument is remarkable for its total failure to even attempt to reconcile their claim of a deprivation of a substantive due process protected right or interest with what this Court has said in decisions such as Reno v. Flores, 113 S.Ct. 1439 (1993), and Collins v. City of Harker Heights, Texas, 112 S.Ct. 1061

(1992), as to substantive due process simpliciter having to do with rights or interests that are "fundamental" or "basic." See Reno v. Flores, 113 S.Ct. at 1447. See also Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2804-08 (1992) (Joint Opinion of Justices O'Connor, Kennedy and Souter). Instead, respondents' strategy is to pretend that this is simply a traditional land use regulation case, which, as we have pointed out in the petition, it most certainly is not.

Respondents have not established, and in this Court they do not even claim, that they were deprived of any fundamental or basic human right. Nor, as we point out next, have they established, and indeed they do not here even claim, that they were deprived by the petitioners of any sort of "property" (see infra).

In thus avoiding, or seeking to

avoid, these questions which are so critical to modern due process analysis the respondents are, essentially, merely aping what the court of appeals (but not the district court) did in this case in refusing to address, to confront, the so clear implications for this case of this Court's most recent substantive due process precedents.

With all respect, this should not be tolerated by this Court. It invites both confusion as to what is the law and, ultimately, disrespect for this Court.

2. RESPONDENTS' FAILURE TO ESTABLISH ANY DEPRIVATION OF A PROPERTY RIGHT.

At a number of points in their Brief in Opposition respondents urge, speaking only very generally, that they were deprived by the petitioners of "their rights to substantive due process" (see respondents' first Question Presented; see also pp. 4 and 6). In addition, they point out that the court of appeals here

held that they were deprived of a "property interest." See id., at 5 and 6-7. However, respondents never clearly identify in their brief just what is the "property" of which they claim they were deprived. Indeed, in this Court they never come right out and claim that they were deprived of "property" by the petitioners.

Also, while in their Statement of the Case respondents note that the court of appeals held that they had "a property right to the excavation permit [sought by the Water Authority]" (Br., p. 5), in their statement of Questions Presented they appear to suggest that their claim that petitioners violated their "rights to substantive due process" is "based upon a deprivation of water supply service to their home" -- seemingly abandoning the holding of the court of appeals that they had a "property interest" in this permit,

and, by implication, appearing to revert to reliance on the district court's holding that the "property" they were deprived of consisted of their interest in obtaining new public water supply service.

This reluctance on the part of the respondents to specify the "property" of which they claim to have been deprived is understandable. As the court of appeals pointed out, the district court's holding that respondents had a substantive due process protected property interest in obtaining public water service was "novel" (see A10). It was also directly contrary to square holdings of two other circuits. See Mansfield Apartment Owners Association v. City of Mansfield, 988 F.2d 1469, 1473-1474 and 1476-1478 (6th Cir. 1993) (rejecting claim that plaintiffs were deprived of substantive due process by reason of municipality's termination of water service); Ransom v. Marrazzo, 848

F.2d 398, 411-412 (3rd Cir. 1988) (same).

Similarly, the court of appeals' holding that the respondents each had a substantive due process protected property interest in this permit sought by others so that those others could excavate in the Town-owned street is itself most difficult to accept. It is, as a matter of the ordinary meaning of language awkward. Compare American Heritage Dictionary of the English Language, definition of "property":

> 1. Ownership. 2. A possession, or possessions collectively. 3. Something tangible or intangible to which its owner has legal title. . . .

Such an "interest" has no analog in traditional common-law notions of "property." Compare Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2900-02 (1992). Nor does this so-called "property" bear any sort of economic or sociological or other functional resemblance to the newer forms of

"property" or "entitlements" referred to in Board of Regents v. Roth, 408 U.S. 564, at 571-72 and 576-78 (1972).

This "property" cannot be traded or spent or sold or given away. It is difficult to conceive how it could be "owned." It cannot be invested or, like a professional license, exploited for economic gain. Nor does it "entitle" its owner to any "benefits" or anything else. Rather, all that it does is to authorize the permit-holder to excavate in the Town-owned street.

Moreover, to the extent this "property" could be "owned" by anyone, the owner would not be the respondents, but rather the Water Authority. Also, to the extent respondents might attempt here to tie a claim of a "property interest" in this permit to the ownership of land, we would again note that this was not the theory upon which this case was tried or

argued or determined in the courts below, and, of course, neither Mrs. Walz nor Robert, Jr. has ever claimed to have any ownership interest in Mr. Walz's property.

Finally, the respondents have not pointed to any state-law "rules or understandings" which define or establish a permit such as this as either "property" or an "entitlement to . . . benefits" which belongs to them. See Board of Regents v. Roth, 408 U.S. at 577.

In short, this "property interest" -- which the respondents never identify in their brief -- is not like any other form of property of which we are aware. It is not "property" under New York law. It is not "property" in the sense that this term is used in the Fifth Amendment's Taking Clause. And, we submit, this permit is not "property" -- and most certainly not the respondents' property -- in the sense in which that term is used in the Due Process

Clause of the Fourteenth Amendment. Cf. Lucas, 112 S.Ct. at 2901, noting this Court's "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments."

3. RESPONDENTS' ADMISSION THAT THE PETITIONER DOWLING HAD DISCRETION WITH RESPECT TO THIS STREET OPENING PERMIT.

In response to our having quoted and relied upon the language of Section 245-16, subd. C of the Smithtown Code as vesting in petitioner Dowling discretion with respect to the issuance and/or conditioning of the street opening permit sought by the Water Authority, respondents argue, in part, that "although petitioner Dowling may have been permitted to impose certain reasonable restrictions, he clearly had no authority to deny the permits outright and deprive respondents

of water service" (Br. at 7). They also urge, at page 12, again without bothering to quote or discuss subdivision C, that "the Code does not give the Superintendent the discretion to impose unreasonable requirements or refuse to issue a permit for any period of time."

Implicit in both of these quoted statements is the recognition, compelled by the so clear language of subdivision C (see Petition at 4), that in fact this local law vests in the Superintendent of Highways very important responsibility and broad discretion to determine what are the implications of a sought permit for the "health and safety of the public" and whether there are any "additional improvements" which should be required or conditions which should be imposed as "necessary and appropriate for the health and safety of the public."

That such discretion might be abused

or erroneously exercised does not in any way detract from the fact that this is a grant of broad discretion which cannot properly be characterized as merely "ministerial." It was only by ignoring this Town Code language that the court of appeals was able to conclude that there was here an "entitlement" to this permit and that petitioner Dowling did not enjoy the protection of the defense of qualified immunity.

Those holdings were error. Dowling had discretion with respect to this permit. And the respondents in effect concede that he had such discretion.

CONCLUSION

For the reasons set forth here and in the petition this Court should grant the writ of certiorari to review the questions which are here presented.

Dated: May 24, 1995

Respectfully submitted,

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